No. 82-647

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Donald J. Kirkpatrick,

Petitioner,

v.

Christian Homes of Abilene, Inc., and the 326th District Court of Taylor County, Texas,

Respondents.

ON WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

PETITIONER'S RESPONSE TO THE QUESTION POSED BY THIS COURT

MARCIA ROBINSON LOWRY
Counsel of Record

GEORGE KANNAR
MICHAEL B. MUSHLIN
Children's Rights Project
American Civil Liberties Union

BURT NEUBORNE
American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioner

PETITIONER'S RESPONSE TO THE QUESTION POSED BY THIS COURT

The Court has asked petitioner to respond to the question whether, in light of the representations in the brief filed by the State of Texas, the Writ of Certiorari should be dismissed, or this case remanded to the Supreme Court of Texas.

Petitioner opposes the dismissal of the writ and/or the remand of this case to the Supreme Court of Texas to determine whether petitioner is entitled to relief under the paternity section of the Texas Family Code. Although petitioner would support the Attorney General's reading of Texas law in the Supreme Court of Texas, petitioner believes it extremely unlikely that the Attorney General's reading would be accepted by that court, and that a remand would create an unnecessary and potentially damaging delay in the permanent placement of the child who is the subject of these proceedings.

I. EXISTING PRACTICE UNDER THE TEXAS STATUTORY SCHEME

The two sections of the Texas Family Code at issue herein govern the establishment of paternity and legitimation, respectively. Cases falling under the paternity section, Subchapter A of Texas Family Code §13, raised for the first time in these proceedings by the Texas Attorney General, involve disputes over the identity of the father of a given child. Cases falling under the legitimation section, Subchapter B of Texas Family Code §13, which both the parties, their experienced counsel, and the courts below concluded

governed this case exclusively, involve attempts by persons whose biological parentage is conceded to assert legal rights in connection with a given child.

Since no question exists as to petitioner's biological status as father, he followed universally accepted Texas practice in seeking to establish his legal rights pursuant to Texas' legitimation statute.

II. THE SUGGESTION OF THE ATTORNEY GENERAL OF TEXAS

The Attorney General of Texas has advanced a novel reading of the Texas Family Code in this Court. Instead of reading the paternity section as establishing and governing proceedings contesting biological parentage, he argues that it is applicable to purely legal issues as well,in cases in which parentage is conceded. If the Attorney General's construction of the Texas Family Code is correct, petitioner, by electing to move under the paternity statute would, in fact, be entitled to the procedural and substantive guarantees which he seeks in this Court. A right as fundamental as parenthood would, under the Attorney General's theory, turn on a technical question of pleading under Texas law.

Unfortunately, however, the Attorney General's construction, which renders the legitimation statute utterly superfluous, is not likely to be adopted by the Supreme Court of Texas. The Texas courts have repeatedly distinguished between Subchapter A, referring to it as the "involuntary legitimation" provision, see, e.g., Wynn v. Wynn, 587 S.W.2d 790 (Tex. Civ. App. 1979), and Subchapter B, the voluntary legitimation provision, Shockome v. Hernandez, 587 S.W.2d 535 (Tex. Civ. App. 1979).

Indeed, Subchapter A provides that paternity be proven through the use of blood tests, Tex. Fam. Code §13.06, while Subchapter B provides that biological parenthood be established through the father's sworn statement of paternity, §13.22. See Shockome v. Hernandez, supra. Furthermore, the Supreme Court of Texas has referred to Section §13.21 as the means by which "the biological father of an illegitimate child . . . establish[es] his status as a parent. . . . " In Interest of T.E.T., 603 S.W.2d 793, 794 (Tex. 1980), cert. den. sub. nom. Oldaq v. Catholic Charities, 450 U.S. 1025 (1980).

III. DIFFICULTIES INHERENT IN THE ATTORNEY GENERAL'S POSITION

Although the Attorney General's reading is not literally foreclosed -- fathers may clearly commence a paternity action under Texas law -- it appears to run headlong into the traditional canon of statutory construction which requires that all parts of a statute be given effect. If the legitimation section of the Texas Family Code may be avoided by the simple expedient of labelling the action as a paternity suit, the legitimation statute will cease to have meaning.

The Attorney General recognizes that an apparently irreconcilable relationship between the paternity and legitimation statutes would be created by his construction, A.G. Br. at 8-9. He argues,however, that since the paternity section was nacted in 1975, and the legitimation section in 1973, the subsequently-enacted paternity section should be read to "negate," A.G. Br. at 9, the prior legitimation statute Unfortunately for this argument, the fact is that both the paternity and legitimation statutes were amended and re-enacted as recently as

1981, thus rendering them of equal status even by the Attorney General's own reasoning. In any event, even if a two-year difference in the age of the statutes existed, the statutes can be reconciled by construing the paternity statute to apply only to cases involving contested issues of biological parentage, which is precisely the reading both counsel below and the Texas Court have effectively given it. This construction, of course, is more likely to be accepted than the Attorney General's reading, which renders the legitimation statute meaningless.

IV. PETITIONER'S REASON FOR OPPOSING REMAND

While petitioner would, of course, support the construction of the Texas Attorney General below, it is doubtful, given the established Texas practice and the approach of the Supreme Court of Texas in In Interest of T.E.T., supra, that the Attorney General would prevail. The net effect of a remand would, therefore, be merely to prolong the period during which petitioner's child remains apart from her natural father and without a permanent home. Thus, while petitioner would ordinarily welcome an opportunity to secure relief pursuant to a remand for re-consideration of state law, the remote chance of success, coupled with a recognition that speedy permanent placement of his child is very important, impels petitioner to object to remand to the Supreme Court of Texas.

Should this Court deem remand appropriate, however, petitioner asks that the judgment of the Supreme Court of Texas be vacated and the case sent down for an expeditious hearing on the Attorney General's novel construction of the Texas Family Code.

Respectfully submitted,

MARCIA ROBINSON LOWRY
Counsel of Record

GEORGE KANNAR
MICHAEL B. MUSHLIN
Children's Rights Project
American Civil Liberties Union

BURT NEUBORNE
American Civil Liberties Union
Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Petitioner

Dated: New York, New York
April 7, 1983